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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LISA LANGE-FITZINGER, Plaintiff and Respondent, v. LYNETTE F. LANGE, Defendant and Appellant.	A153791 (Contra Costa County Super. Ct. No. C16-01085)

William Lange and Lura-Lee Lange were married for 42 years. Lura-Lee died in 2006, and after her death much of her jewelry, including a diamond-studded pendant, became the property of the couple's only daughter, respondent Lisa Lange-Fitzinger (Lisa). In 2007, William married appellant Lynette Lange (Lynette), who was allowed to wear the pendant, which was in fact kept in the home she shared with William.[1] The marriage disintegrated, and in April 2013, Lynette filed for dissolution and moved out of the family home, taking the pendant with her. In May 2016, through counsel, Lisa demanded return of the pendant. Lynette refused, and in June 2016, Lisa sued for conversion, a claim Lynette asserted was barred by the three-year statute of limitations. Following a short bench trial, the court ruled against Lynette, finding among other things

[1] For ease of understanding, and as is typical in litigation involving family members, we refer to the participants by their first names.

that she failed to meet her burden of proving the facts supporting her statute of limitations defense. Lynette appeals. We affirm.

BACKGROUND

The General Factual Setting

William and Lura-Lee Lange were married in 1964, a marriage that lasted until 2006, when Lura-Lee died. They had two children, Lisa and Michael.

During their lengthy marriage, William gave Lura-Lee various items of jewelry, including a two-tone pendant with a 4.05-carat princess-cut diamond and a 0.73-carat square cut diamond (the pendant) and an 18-carat gold tennis bracelet with 28 square-cut diamonds and a total diamond weight of 4.48-carats (for consistency with the briefing, the original bracelet). The two items will sometimes be called the jewelry.

Lura-Lee's estate plan included a will that directed that all of her possessions go to the William E. and Lura-Lee G. Lange Living Trust (the trust), which provided no directions for the jewelry. While the trust was silent on that subject, the evidence at trial was not, which was that on Lura-Lee's death the jewelry was to be Lisa's. That was William's understanding, and it was Lisa's understanding, understandings confirmed by the evidence, both oral and written. For example, after Lura-Lee died William told Lisa that "this [jewelry] is yours." Lisa testified that on her mother's death everything on her mother's (and, for that matter, grandmother's) side of the family was to go to her as the only living female heir. Lisa also testified that her mother wrote "lists for everything," one of which was a list noting that on her death Lisa was to get the jewelry. And Cathy Thompson, a close friend of Lisa's from childhood, confirmed that Lura-Lee told her that when she died, Lisa would get the jewelry.

In October 2007, William met Lynette Reddy. They quickly became engaged, and, in December 2007, married. Along the way, Lisa agreed that Lynette could wear the jewelry, and Lynette wore both the pendant and the original bracelet at her wedding to William. Lynette continued to wear the jewelry after the wedding, which in fact was kept in her jewelry box.

Shortly after the wedding, at a New Year's Eve party, Lynette lost the original bracelet. Around Valentine's Day 2009, she and William went to a jewelry store and bought another tennis bracelet (the replacement bracelet).

William and Lynette were, to use Lynette's word, "euphoric" at their marriage. However, the marriage apparently had issues early on, and by fall 2011 had soured, Lynette describing "some income tax problems that [she] didn't feel [William] was reporting for joint income properly," causing her to go to a tax attorney. Lynette also described "fights" they had, one of which she described as "very serious." It was in 2012, apparently in the spring, ("roughly a year before the divorce"), and was generated by Lynette's concern that William, who was "managing about 350 million" of other people's money, had not complied with the recently enacted Dodd-Frank law requiring registration of investment advisors. As Lynette put it, "I told him I loved him very much, but I wouldn't stay in the marriage unless he was operating the hedge fund legally, and I gave him one year from April 2012 to April 2013."

During that incident, the subject of divorce came up, and in the course of it William prepared a list on which he wrote that Lynette should return the "Lange jewelry I let you wear." The pendant and the replacement bracelet were included on the list, as was an engagement ring William had given Lynette. Presented with the list, Lynette left the pendant and replacement bracelet on William's desk. William apparently put the items back in Lynette's jewelry box, and she continued wearing them, as the marriage continued. Until 2013.

Sometime in early April 2013, Lynette filed for dissolution, and on April 9, she moved out of their home, with William served the dissolution papers the next day. Lynette arranged for movers to come to the home (along with some representatives from the sheriff's office) to move her out, all without the knowledge of William, who was apparently rousted out of bed by the movers. Lynette took some furniture, various personal effects, and the pendant and replacement bracelet.

When Lynette moved out, she did not tell William or Lisa that she kept the pendant and replacement bracelet. And Lisa testified she did not realize Lynette had the pendant with her until a few days after Lynette left.

After Lynette moved out, she did not see, or even talk with, William other than in the context of their divorce proceedings, divorce proceedings that, according to Lynette, "remained pending at the time of trial." As for Lisa, after Lynette moved out, Lisa never talked to her again, her first contact with her being through Lisa's counsel, who in May 2016 demanded return of the jewelry.[2]

During the divorce proceedings, Lynette did not ask the court to award her either item of jewelry, nor did she identify either item as her separate property. To the contrary, on her schedule of assets and debts, under the line for "Jewelry, Antiques, Art, Coin Collections, Etc.," Lynette listed "Miscellaneous." William did list the jewelry as his separate property, a designation to which Lynette declined to respond.

At some point in the course of the divorce, Lynette reported that the pendant and replacement bracelet had been stolen. William asked Lynette for a list of the items claimed to be stolen, to no avail, and only after this lawsuit was filed did he learn that Lynette still had the items.

In November 2013, William and Lynette signed a settlement agreement, which agreement was silent as to the jewelry.

As noted, by letter dated May 3, 2016, Lisa's attorney demanded that Lynette return the jewelry by May 12. Lynette refused, testifying that the pendant "means more to me than it means to Lisa."

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[2] At trial, Lisa was asked about the jewelry, including in this exchange:

"Q: And what is the reason you didn't ask prior to May 3rd, 2016 for the jewelry to be returned.

"A: Several reasons. One, my father was fighting to get my jewelry back through his divorce case. And it kept getting flip-flopped. I would hear she didn't have it. She lost it. It was stolen. It was a gift. It was just numerous different reasons as to why I couldn't get my jewelry back. And I finally just said, you know what, it is my jewelry. It is my responsibility."

This lawsuit followed.

The Proceedings Below

On June 1, Lisa filed suit against Lynette, asserting two claims: (1) conversion; and (2) assumpsit. The complaint sought return of the pendant and the replacement bracelet and/or damages compensating her for the value of the jewelry.

On July 7, Lynette filed her answer, denying all allegations except two, admitting that (1) Lisa sent a letter demanding return of the jewelry in May, 2016 and (2) she refused to comply with Lisa's demand.

Lynette also asserted several affirmative defenses, including as pertinent here that Lisa's claims were barred by the statute of limitations. Lynette also claimed that she, not Lisa, owned the pendant, and that Lisa misrepresented ownership of the pendant by allowing Lynette to wear it.

In August 2017, the case came on for a non-jury trial, prior to which the parties stipulated that if Lisa prevailed her relief would be the value of the replacement bracelet ($9,500) and recovery of the pendant. Testimony was taken on one day, during which six witnesses testified: Lisa, Lynette, William, Lynette's older daughter, and two childhood friends of Lisa's. Neither side requested a statement of decision. The parties argued the matter in written post-trial briefs, and on October 5 the trial court took the matter under submission.

On November 29, the court issued its decision and order following court trial, which as pertinent here found as follows:

(1) Lisa, not William, owned the pendant and original bracelet after Lura-Lee's death;

(2) Lynette owned neither the pendant nor the original bracelet;

(3) William was not the owner of the jewelry and had "neither the ability nor authority to 'gift' it to [Lynette]";

(4) "[W]ith the consent of [Lisa], [Lynette] was allowed to wear the jewelry until its return was requested by [Lisa]";

(5) Lisa first asked Lynette to return her pendant on May 3, 2016;

(6) Lynette refused to return Lisa's pendant after Lisa demanded it back; and

(7) Because Lisa owned the pendant and Lynette refused to return it upon Lisa's request, Lynette committed conversion.

The court ordered Lynette to return Lisa's pendant to her. The court also rejected Lynette's assertion that Lisa's claim was barred by the statute of limitations, specifically finding that Lynette "failed to sustain her burden of proof that the statute of limitations for conversion pursuant to [Section 338, subdivision (c) of the Code of Civil Procedure] had run . . . [as of] June 1, 2016," when the complaint was filed, that "[t]he evidence was insufficient to establish by a preponderance of the evidence that [Lisa] had demanded return of the jewelry which was refused by [Lynette] more than 3 years before the date the complaint was filed."

The court also found that Lynette owned the replacement bracelet, a finding Lisa does not contest on appeal.

DISCUSSION

Lynette Has Not Demonstrated Error

As indicated above, while this action involved two pieces of jewelry, the court found for Lynette as to the bracelet, a holding Lisa does not challenge. So, the only issue here involves the pendant, which the trial court ordered Lynette to return to Lisa.

As to the pendant, Lynette claimed at trial that she owned it, having been given it by William. The trial court decided the ownership issue in favor of Lisa, a decision Lynette expressly acknowledges she "does not contest" on appeal. Rather, as Lynette puts it in her brief, she "focuses her appeal on the findings of the trial court that pertain directly to her statute of limitations defense." The first is the finding that Lynette "was allowed to wear the jewelry until its return was requested by [Lisa]," as to which Lynette contends "that the condition of 'until its return was requested by [Lisa]' finds no support in the record, and is thus, not supported by substantial evidence." And Lynette goes on: "From that finding, the trial court found: (1) [Lynette] converted the jewelry when she failed to return it after [Lisa] demanded its return, and (2) that because [Lisa's] demand was not more than three years prior to when [Lisa] filed her complaint, [Lynette] had not

borne her burden of proof as to the statute of limitations defense. [Lynette] contends that no demand was necessary for the cause of action of conversion to accrue, and that therefore the statute of limitations began to run on April 8, 2013, when she moved out and took the jewelry, or at the very latest began to run a couple of days after that, when [Lisa] acknowledges that she knew the jewelry was missing and asked her father to get it back. Accordingly, [Lynette] requests that this Court reverse the judgment below."

The request is not well taken. For several reasons.

We begin by noting, as mentioned above, that neither party requested a statement of decision, and the trial court provided none, a fact that can be devastating to Lynette's appeal. As one court put it, a statement of decision is "essential to effective appellate review." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982.) In the words of another, without a statement of decision, the judgment is "effectively insulated from review by the substantial evidence rule . . . ." (*Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 168.)

The leading appellate commentary describes it this way: "[T]he appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record; i.e., the necessary findings of 'ultimate facts' will be implied and the only issue on appeal is whether the 'implied' findings are supported by 'substantial evidence.' (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792–793; *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148, fn. 11 (citing text); *LSREF2 Clover Property 4, LLC v. Festival Retail Fund 1, LP* (2016) 3 Cal.App.5th 1067, 1076; see *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970–971 . . . .

"The doctrine is a 'natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 [Cal.App.]4th 42, 58; *Acquire II, Ltd. v. Colton Real Estate Group*, *supra*, 213 [Cal.App.]4th at [p.] 970]." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 8:22, pp. 8-8 to 8-9.)

Assuming those principles do not defeat Lynette here, other principles do, including that Lynette's argument ignores the governing law on appeal.

The statute of limitations is an affirmative defense, and thus "a defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10; accord, *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310 [" 'statute of limitations is an affirmative defense and its elements must be proved by the party asserting it' "].) As quoted above, the trial court expressly found that Lynette failed to sustain her burden on the issue. In light of that, Lynette has a particularly heavy burden on appeal, as set forth, for example, in *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466: " 'Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (Accord, *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 967.) As the Supreme Court described this concept long ago, "The question for this court to determine is whether the evidence compelled the trial court to find in their favor on that issue." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 571.)

Lynette has not even attempted such showing here. In any event, such attempt would necessarily fail under the law of conversion, providing an additional reason the trial court's ruling was correct.

" ' " 'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages.' " ' " (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) And conversion is a question of fact. (*Smith v. Bull* (1958) 50 Cal.2d 294, 306; *Wolfe v. Willard H. George, Inc.* (1930) 110 Cal.App. 532, 536.)

As noted, the trial court found that Lisa owned the pendant, a finding Lynette expressly "does not contest." The trial court further found that Lynette was allowed to wear the pendant because Lisa told her father she could. To put it otherwise, Lynette was allowed to wear it "with the consent" of Lisa. So, Lynette's wearing of the pendant was not a conversion. (See *Farrington v. A. Teichart & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [no conversion when owner expressly or impliedly assents to, or ratifies, use of the property].)

And on the question of when the conversion occurred, the trial court held it was when Lynette refused Lisa's demand that she return the pendant—a holding fully consistent with applicable law. The applicable CACI instruction tells a jury that among the things a plaintiff must show to prove conversion is that the defendant "substantially interfered with [the] property by knowingly and intentionally" doing something to that property. (CACI No. 2100.) And, the directions for use add, when the defendant's original possession of the property was not tortious—as here—plaintiff must prove that defendant refused to return the property after a demand for its return. As this court has summed up the law, "There is no conversion and the statute of limitations does not start to run against an owner of property . . . until the . . . adverse claim is brought to the owner's knowledge. [Citation.] Where an original taking is wrongful, the bar of the statute runs from the time of the unlawful taking, but where the original taking is lawful, the statute is not set in motion until the return of the property has been demanded and refused or until a repudiation of the owner's title is clearly and unequivocally brought to his attention." (*Bufano v. San Francisco* (1965) 233 Cal.App.2d 61, 70 (*Bufano*); see also *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918; *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1088.)

As quoted above, Lynette argues that conversion occurred when she took the pendant with her when she left William's house, or at the latest a few days later. But Lynette points to nothing that supports her view, no fact and no law, certainly no law that demonstrates "a repudiation" of Lisa's title "clearly and unequivocally" brought to Lisa's attention, to "the owner's knowledge." (*Bufano, supra,* 233 Cal.App.2d at p. 70.)

Lisa's position—a position with which the trial court agreed—was that the pendant was hers. Lynette's position below, both at trial and post-trial, was that the pendant was hers, having been given to her by William. So, when she moved out, she had "no need" to tell Lisa or William she was taking the jewelry. Likewise during the divorce proceedings, Lynette never asked the court to award her the pendant because "It was mine." And the evidence showed that once Lynette moved out, she and Lisa did not talk again, their first "communication" via the May 3, 2016 letter from Lisa's attorney. In short, Lynette's refusal to return the pendant was the first time that any "repudiation" of Lisa's title was brought to her "knowledge." (*Bufano, supra,* 233 Cal.App.2d at p. 70.)

Bufano, supra, 233 Cal.App.2d 61 is instructive. There, a renowned sculptor produced two sculptures that made their way into the possession of the City of San Francisco, which possession continued over several years, possession of which Bufano was aware. (*Id.* at pp. 63, 67–68.) In 1942, the City passed a resolution suggesting it believed it owned the sculptures, and in fact posted a sign next to one sculpture claiming it as the City's property. Moreover, during an art commission meeting, the City announced the sculptures were the City's property. Bufano testified he saw none of these ownership proclamations, and that it was not until he saw a second City resolution, in 1961, suggesting ownership of the sculptures that he became concerned. At that point, he requested the City affirm his ownership of his sculptures. The City refused (*id.* at pp. 65–67, 70), and he sued.

A jury found for Bufano, but the trial court entered judgment notwithstanding the verdict. (*Bufano, supra,* 233 Cal.App.2d at p. 63.) This court reversed, in the course of which we discussed the City's contention that there was a conversion in 1942 and thus Bufano's suit, filed in 1962, was barred by the statute of limitations. We rejected the contention, concluding that the City did not communicate to Bufano a clear repudiation of his ownership right to the sculptures, and thus the conversion did not occur until the City clearly communicated a repudiation of the artist's title to the sculptures by refusing to return them after Bufano demanded them back. (*Id.* at ap. 71.)

While Lynette now dramatizes her retention of the pendant when she moved out, at trial she claimed she had lawful possession of the pendant when she moved because she owned it. Now on appeal, Lynette attempts to revise her position and assert that her possession was unlawful after she moved out in April 2013. Lynette cites no law supporting this argument, as *Bono v. Clark* (2002) 103 Cal.App.4th 1409 (*Bono*), the primary case on which she relies, is distinguishable.

Bono, supra, 103 Cal.App.4th 1409 was an action by a wife in a dissolution proceeding against the executor of her husband's estate (the dissolution action having not been resolved by the time of the husband's death), which sought declaratory relief to determine community property rights. The wife lost at trial on various theories, including, as applicable here, the trial court granting summary adjudication on her cause of action for conversion on the basis it was barred by the three-year statute of limitations. (*Id.* at p. 1416.) While the Court of Appeal reversed in part, it affirmed the summary adjudication that the conversion action was time-barred. (*Bono, supra,* 103 Cal.App.4th at p. 1434.)

The facts there included that the parties separated on Labor Day 1994. The wife moved from the property at that time, and in September 1994 a mutual restraining order was issued, preventing her from returning. (*Bono, supra*, 103 Cal.App.4th at p. 1415.) The wife sued in July 1999. This was too late, the court affirmed, in this one-sentence analysis: "Here, there is no question that the decedent acted in a manner inconsistent with plaintiff's rights. He refused to permit plaintiff to retrieve some of her property in August 1994, forcing her to enlist the aid of a law enforcement officer to retrieve what she could. The parties' confrontations at that time put plaintiff on notice of the need to protect her property and triggered the running of the statute of limitations as a matter of law." (*Id.* at p. 1434.) That is not the situation here.

Lynette asserts that the facts surrounding when the statute of limitations begins to run are undisputed, and thus our review is de novo. To begin with, we do not view the facts as undisputed. But even if they were, it would still not avail Lynette, not under the

law of conflicting inferences. Again, the leading appellate commentary is apt, explaining the rule and the cases applying it:

"Under the 'conflicting inference' rule, the appellate court must indulge all *reasonable* inferences that may be deduced from the facts in *support of the party who prevailed* in the proceedings below. [*Kuhn v. Department of General Services* (1994) 22 [Cal.App.] 4th 1627, 1632–1633; see *County of Kern v. Jadwin* (2011) 197 [Cal.App.]4th 65, 72–73,—'substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom'.] [¶] Even if the facts were admitted or uncontradicted, the appellate court will not substitute its deductions for the reasonable inferences actually or presumptively drawn by the trial court. [*Boling v. Public Employment Relations Bd.* (2018) 5 [Cal.]5th 898, 913; *Mah See v. North American Acc. Ins. Co. of Chicago, Ill.* (1923) 190 [Cal.] 421, 426, (overruled on other grounds in *Zuckerman v. Underwriters at Lloyd's, London* (1954) 42 [Cal.]2d 460, 474); *McDermott Will & Emery LLP v. Super.Ct. (Hausman)* (2017) 10 [Cal.App.]5th 1083, 1102, (citing text); see *Escobar v. Flores* (2010) 183 [Cal.App.]4th 737, 752,—'On this record, we cannot say the inferences the trial court drew were unreasonable, and this precludes us from overturning the court's determination']." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:60, pp. 8-27 to 8-28.) See *Milton v. Perceptual Develop. Corp.* (1997) 53 Cal.App.4th 861, 867 ["If the evidence gives rise to conflicting inferences, one of which supports the trial court's findings, we must affirm"].

DISPOSITION

The judgment is affirmed. Lisa shall recover her costs on appeal.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

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